Supreme Court, U.S.
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No. 92-1062

In The

Supreme Court of the United States

October Term, 1992

I.T.O. CORPORATION OF BALTIMORE,

Petitioner,

vs.

WILLIAM SELLMAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS WILLIAM AND RHODA SELLMAN

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court grant a writ of certiorari where there is no conflict among the Circuits that in an action under the Longshore and Harbor Workers' Compensation Act (LHWCA), an employee need not file a LS33 form where the employer is an actual party to a third party suit and fully participates and effectuates a settlement of that suit?

II. Should this Court grant a writ of certiorari where there is no conflict among the Circuits that in an action under the Longshore and Harbor Workers' Compensation Act (LHWCA), a third party settlement intended to be compensation for loss of consortium is not subject to an offset of compensation benefits?

III. Should this Court grant a writ of certiorari to determine whether the Fourth Circuit properly followed its own local rules?

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BRIEF IN OPPOSITION FOR RESPONDENTS WILLIAM AND RHODA SELLMAN

STATEMENT OF THE CASE

On July 10, 1979, the Respondent, William H. Sellman, 46 years old, was severely injured when he fell approximately 40 feet while on the vessel ALGENIB upon which he was working. As a result of the fall, the Respondent sustained severe head trauma, including a fractured skull, was rendered partially paralyzed, and

was left in need of extensive medical and hospital care. He is now confined to a bed or wheel chair and for the most part is non-communicative. There is no dispute that he is permanently totally disabled.

The Respondent, Rhoda Sellman, is Mr. Sellman's wife and was appointed his legal guardian by the Circuit Court for Baltimore County. She manages all of Mr. Sellman's personal affairs and assets since he is unable to do so as a result of his debilitated condition.

The Petitioner, I.T.O. Corporation of Baltimore, is the successor corporation to Mr. Sellman's employer at the time of his injury, Atlantic & Gulf Stevedores, Inc. Mr. Sellman's employer commenced the payment of workers' compensation benefits under the Longshore and Harbor Worker's Compensation Act following his injury.

Thereafter, the Atlantic & Gulf, through its own counsel, and Mr. Sellman, Mrs. Sellman, and their children, through their personal attorney, filed a joint lawsuit against various third parties, including the owners of the vessel on which Mr. Sellman was injured. Count IX of the Complaint was a claim by the Petitioner for compensation "for the medical and hospital care and treatment which it has and will supply to William H. Sellman, Jr., Plaintiff." I.T.O. agreed to fund the expenses of the trial and participated in all facets of the case. It was represented in the case by A. Owen Hennegan and later by his son, John O. Hennegan.

The Sellmans and I.T.O. entered into extensive settlement negotiations with the vessel's owner. Liability was extremely difficult in the case and I.T.O. was well aware of the complexities of the case. The parties eventually entered into joint settlement agreements with the owner of the ALGENIB. The parties agreed to accept a total of $500,000 of which the Sellmans and I.T.O. each

agreed to accept $250,000. All of the parties to the settlement agreements recognized that the intent of the agreement was that the Petitioner, I.T.O., would accept $250,000 in full satisfaction of its lien, that the Respondents, William and Rhoda Sellman, would receive $250,000 free and clear of any lien, and that compensation benefits would continue *without offset*. There was a dispute as to whether the Sellman money was compensation for Mr. Sellman's injuries, the Sellman's loss of consortium, or both.

After the disbursement of the settlement proceeds, counsel for Mr. Sellman asked I.T.O. to sign and file a LS-33 Employer Approval Form to approve of the Sellmans' third party settlement. I.T.O. refused to sign the form and terminated temporary total disability payments. The Sellmans then requested a hearing on the issue of whether the termination was proper.

On June 24, 1985, after an informal conference, the Deputy Commissioner entered his Memorandum of Informal Conference wherein the he recommended a finding that the $250,000 paid by the third party to the Sellmans was paid for loss of consortium only and was not subject to offset by the employer. (Apx. A). He also held that the filing of the form was unnecessary due to the employer's participation in the third party case and he suspended the requirement for the filing of the LS-33 form.

I.T.O. took an appeal and a hearing was held before The Honorable G. Marvin Bober, an administrative law judge, over a period of several days at which time testimony was taken from all pertinent witnesses. On June 29, 1987, Judge Bober concluded that the employer was not entitled to an offset of $250,000 against compensation and medical payments under the LHWCA. Judge Bober also held that the employer was not entitled to terminate future compensation and medical benefits to the Respondent based upon the failure to file a LS-33 approval form. In so holding, he found that even if the settlement was not for loss of consortium, the

filing of an LS-33 form was not required under the facts and circumstances of the case. He held that the filing requirements of 33(g) did not apply where ". . . the employer from the start is a co-plaintiff in the third party lawsuit and negotiates and enters into its own settlement agreement with the defendants . . ." and where the evidence further showed that the employer, and not the Respondent, was in control of the lawsuit, thus eliminating the possibility that the Respondent would act unilaterally against the employer's interest. (Apx. B).

On July 31, 1990, the Benefits Review Board filed its decision and order affirming the findings of Judge Bober. (Apx. C). The Board held that under the facts and circumstances of this case, the statutory requirement of written approval and the filing of an LS-33 administrative form was satisfied or otherwise inapplicable. The Board held that the statutory filing requirement is inapplicable where the employer itself is a party to the litigation, actively involved in settlement negotiations, and executes a settlement agreement to dispose of the entire third-party claim. The Board also agreed that I.T.O. was not entitled to any offset.

I.T.O. appealed to the Court of Appeals for the Fourth Circuit which affirmed in part and reversed in part the decision of the Board. *See I.T.O. Corporation v. Sellman*, 954 F.2d 239 (4th Cir. 1992) (Apx. D). The Fourth Circuit affirmed the Board's holding that Section 33(g) did not apply where the employer is a party to the lawsuit and participates fully in settlement negotiations. However, it reversed the portion of its decision finding that there was no offset for the net benefit received by Mr. and Mrs. Sellman. In doing so, it relied primarily upon the case of *Force v. Kaiser Aluminum & Chemical Corporation*, 23 BRBS 1 (1989), *rev'd in part sub. nom. Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991), which had held that if the settlement agreement is silent on the distribution of the settlement proceeds, then no apportionment can be made for the loss of consortium count.

However, the Ninth Circuit reversed this portion of the *Force* holding in *Force v. Director, OWCP*, 938 F.2d 981 (9th Cir. 1991). The Ninth Circuit held that the Administrative Law Judge must decide as a matter of fact which portion of the settlement was intended to be apportioned for loss of consortium. *Id.*, 938 F.2d at 985-986. The employer bears the burden of establishing the amount of the credit. *Id.*

As a result of the decision of the Ninth Circuit in *Force*, the Director then filed a Petition for Rehearing and the Fourth Circuit then modified its earlier ruling. *I.T.O. Corporation v. Sellman*, 967 F.2d 971 (4th Cir. 1992) (Apx. E). It held that the Administrative Law Judge must determine the amount of the settlement that was intended to be compensation for loss of consortium. The case was then remanded to the Administrative Law Judge to hear evidence on this issue.

Subsequent to the Fourth Circuit's second decision in this case, this Court decided the case of *Estate of Cowart v. Nicklos Drilling, Co.*, __ U.S. __, 112 S. Ct. 2589 (1992). In *Cowart*, this Court held that Section 33(g) requires that the employer consent in writing to a settlement under Section 33(g) even if the employer had not yet paid compensation benefits.

I.T.O. then filed a Petition for Rehearing arguing that under *Cowart*, the failure to file the LS-33 form terminated Mr. Sellman's right to benefits. The Respondents opposed the Petition as did the Director and the issue was fully briefed. The Fourth Circuit denied the Petition for Rehearing.

Dissatisfied with the decisions below, I.T.O. has now filed a Petition for Certiorari. As shall be explained below, these issues do not warrant consideration by this Court since there is no conflict amongst the Circuits and the decision of the Fourth Circuit does not conflict with this Court's decision in *Cowart*.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO REASON TO GRANT REVIEW ON THE ISSUE OF WHETHER SECTION 33(G) REQUIRES THAT AN LS-33 FORM BE FILED SINCE THERE IS NO OTHER DECISION IN CONFLICT WITH THE FOURTH CIRCUIT'S DECISION BELOW.

A. Contrary To I.T.O.'s Assertion, There Is No Conflict Between This Case And This Court's Decision In *Cowart.*

In *Estate of Floyd Cowart, Petitioner v. Nicklos Drilling Co.*, __ U.S. , __ 112 S.Ct. 2589 (1992), decided just eight months ago, this Court interpreted the application of 33 U.S.C. Section 933(g) [Section 33(g) of the Longshore and Harbor Workers' Compensation Act] at great length. It held that a person who settles a third party case must file a LS-33 form even if they have not yet made a worker's compensation claim. Unlike in the instant case, the employer in *Cowart* was not a party to the lawsuit and did not participate in the litigation through its own counsel.

The express language of the statute makes it obvious that it does not apply where the employer enters into a settlement with a third party. The pertinent portion of Section 33(g) states as follows:

> (1) *If the person entitled to compensation enters into a settlement with a third person* . . . for an amount less than the compensation to which the person . . . would be entitled under this Act, the employer shall be liable for compensation as determined under subsection (f) only if written approval of the settlement is obtained from the employer and the employer's carrier . . . [Emphasis Added].

33 U.S.C. Section 933(g).

Here, the "the person entitled to compensation *and the employer*" entered into a settlement with the third person. Therefore, Section 933(g) does not apply. As the Fourth Circuit explained in its first decision in this case, Section 33(g) does not apply here because the person entitled to benefits, Mr. Sellman, and the employer were both parties to the case and simultaneously settled the case:

> We agree with the claimant and the Board that the purposes of section 33(g) would be ill served by permitting the termination of benefits where employer has directly insured, by its own actions, the protection of its offset rights. *In this case, I.T.O. directly participated in the third-party action against the ALGENIB defendants, and fully participated in the negotiations . . .*
>
> . . . [The] employer's conduct in this case rendered section 33(g) inapplicable. The language of the statute supports this construction. *Section 33(g) contemplates a situation where "the person entitled to compensation" reaches a settlement with a third party. This language reflects the concern alluded to earlier over unilateral action which is detrimental to the employer. Conspicuously, the statute contains no reference to written approval or notice requirements where the employer participates in the settlements.* Accordingly, we conclude that written approval is unnecessary.

I.T.O. Corporation v. Sellman, 954 F.2d 239, 242-243 (4th Cir. 1992) (emphasis added).

Here, the employer (1) was a party to the third party suit; (2) had its own counsel participate in the litigation; (3) maintained actual control over the litigation; and (4) simultaneously settled its case with the Claimant and the third party. This is not a case where I.T.O. was surprised or harmed by the outcome of the third party proceedings. They were fully aware of the settlement arrangement. In fact, they benefited from the settlement because the case was extremely difficult to win and $250,000 was certainly better than no recovery at all. If the Claimant was not given a portion of the recovery, then he would have had no incentive to agree to the settlement and he would have proceeded to trial.

Incredibly, I.T.O. now argues that the filing of the written form is necessary *even where it is a party to the case and controls the litigation.* This makes no sense. If I.T.O. was unhappy with the settlement offer, it could have rejected the offer and the case would have proceeded to trial. The case could not settle without their consent since they were a party to the proceedings.

The purpose of Section 33(g) is to ". . . protect against an employee accepting too little . . . in those circumstances where . . . [the employee] . . . is in control of the litigation." *Banks v. Chicago Grain Trimmer Assoc.*, 390 U.S. 459 (1968); *Robinson Terminal Warehouse Corp. v. Adler*, 440 F.2d 1060 (4th Cir. 1971). When an employer actively negotiates its own interest and controls the third party case, its interests are adequately protected without resort to Section 33(g). *Williams v. Halter Marine Services, Inc., et al.*, 19 BRBS 248 (1987). There is no such danger where the employer institutes the third party suit, protects its own interest, is represented by its own attorney, and actively participates in settlement negotiations. Therefore, the Fourth Circuit decision in this case is proper and should not be disturbed.

This Court, in *Cowart,* in fact recognized two exceptions to the filing requirement where notice to the employer was deemed to be unnecessary in circumstances along these lines. First, where the case proceeds to trial and a judgment is obtained, then no written requirement exists because the consent of the employer would serve no purpose since the employee cannot determine the amount. *Id.*, 112 S.Ct. at 2598. Second, where the employee settles for an amount greater than the lien of the employer, then written approval is not necessary since the employer is fully protected. *Id.* Similarly, where the employer files the suit and controls the litigation, requiring written consent would serve no useful purpose.

Moreover, the LHWCA, and Section 33(g) in particular, were based upon the New York worker's compensation scheme. *Bloomer v. Liberty Mutual Insurance Co.*, 445 U.S. 74, 81, n.5 (1980). The courts construing the New York compensation statute have recognized that employer approval of third party settlements is not necessary where a duly authorized representative of the carrier actively participates in the third party settlement and obtains a direct benefit for the carrier. *Noyes v. First National City Bank,* 39 A.D.2d 183, 333 N.Y.S.2d 117, 119 (1972), *aff'd mem.*, 33 N.Y.2d 723, 349 N.Y.S.2d 996, 304 N.E.2d 565 (1975).

B. Unlike In *Cowart,* The Director Has Supported The Respondents' Interpretation Of The Act And Its Interpretation Should Be Given Deference.

This Court placed great emphasis in *Cowart* on the fact that the Director modified its earlier position and supported the eventual Supreme Court decision. The Supreme Court noted that had the Director maintained his original interpretation of Section 33(g), the Court's decision may have been difficult since the Court must give "judicial deference to a reasonable statutory interpretation by an administrative agency." *Id.*, 112 S.Ct. at 2594; *see also, Chevron, U.S.A., Inc. v. Natural Resources Defense*

Council Inc., 467 U.S. 837 (1984); *National R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S __, 112 S.Ct. 1394 (1992). Since the Director had changed its stance which was in conflict with the original ALJ decision, no weight was to be given to the contrary position.

In the instant case, the Director has maintained all along that Section 33(g) does not apply in this case since the employer was a party to both the third party case and the settlement negotiations. The Director vehemently argued this position before the Fourth Circuit. The Respondent has been informed that the Director maintains that same position today even after the Supreme Court decision in *Cowart.* Thus, great deference should be given to the Director's position which is entirely consistent with this Court's previous decision on this issue.

C. There Is No Conflict Among The Circuits On This Issue.

There is *no* case in any other Circuit which is in conflict with the decision of the Fourth Circuit below. No other appellate court has decided the issue of whether a LS-33 form must be filed where the employer is a party to the litigation. The time is not ripe for this Court to take this issue at this time. Instead, it should wait for other appellate courts to face the issue squarely in light of this Court's decision in *Cowart.*

I.T.O. cannot point to a single decision where a court held that the LS-33 form must be filed where the employer is a party to the suit. Instead, it attempts to argue that the Fourth Circuit decision in this case is inconsistent with decisions of the Fifth Circuit in *Petroleum Helicopters Inc. v. Collier,* 784 F.2d 644 (5th Cir. 1986) and *Nicklos Drilling Co. v. Cowart,* 784 F.2d 644 (5th Cir. 1990), *aff'd, Cowart v. Nicklos Drilling Co., supra.* Such is not the case.

In *Collier*, the claimant settled his third party case without the participation or consent of his employer. The employer was not a party to the case and this was important because it never gave the employer the opportunity to protect its right to set off. The Fifth Circuit held that Section 33(g) mandated that a LS-33 form be filed.

In *Cowart, supra,* the Claimant had received temporary total disability payments until he was released to return to work. Subsequently, without the written approval of the employer or its carrier, Cowart settled his third-party claim for a lump sum payment of $45,000. While the employer had notice of the settlement, it did not provide written approval, execute a written settlement agreement, participate in negotiations toward settlement, nor was it a party to the third party action. As a result, the Fifth Circuit held that the written approval requirement of 33(g) had been violated.

It is obvious that the factual pattern of *Cowart* has nothing to do with the factual pattern presently before this Court. In *Cowart,* the employer/insurer played no role whatsoever in the settlement negotiations between the Claimant and the third party defendant. The employer/insurer was not a party to the case and was not represented by personal counsel. Nothing could be further from the facts in the case at bar.

In both *Collier* and *Cowart, only* the employee settled with the third party. In the instant case, "the person entitled to compensation *and the employer"* settled with the third party. Therefore, Section 33(g) under these facts does not require the filing of the LS-33 form.

On the other hand, the case of *Williams v. Halter Marine Services, Inc., et al.,* 19 BRBS 248 (1987), is identical to the facts of the instant case and supports the Respondents' position. In

Williams, the carrier intervened in litigation which was prosecuted by the Claimant. During the course of the litigation, the case settled for $3,000.

The settlement agreement was not signed by the carrier. However, the carrier did join in a motion to dismiss the entire action based upon the settlement agreement. The issue before the Board was whether the filing requirements of Section 33(g) barred recovery.

The Board refused to bar future worker's compensation benefits holding that since the employer was a party to the case, Section 33(g) did not apply. The Court also recognized that *Collier*, relied upon by the Petitioner, was distinguishable on its facts and did not apply.

Similarly, in *Pinell v. Patterses Services*, 22 BRBS 61 (1989), the employer intervened in litigation and participated in settlement negotiations. It agreed to waive part of its lien and all parties settled the case simultaneously. However, the LS-33 form was never filed. The Board distinguished *Collier* and held that the participation in the case by the employer eliminated the need for the filing of the form.

There is simply no conflict among the Circuits on this issue and there is no reason for this Court to issue a writ of certiorari in this case.

II.

THIS COURT SHOULD REFUSE TO ISSUE A WRIT OF CERTIORARI ON THE ISSUE RELATING TO OFFSET UNDER SECTION 33(F) SINCE THE FOURTH CIRCUIT'S DECISION FOLLOWS THE NINTH CIRCUIT DECISION IN *FORCE*, THE ONLY APPELLATE COURT TO REACH THIS ISSUE.

Alternatively, I.T.O. argues that the Fourth Circuit erred in holding that claims for loss of consortium are not subject to offset. Here, it is clear that there is no conflict among the Circuits on this issue. In fact, the Fourth Circuit in the instant case based its holding on the Ninth Circuit decision in *Force v. Director, Office of Worker's Compensation Programs,* 938 F.2d 981 (9th Cir. 1991). With two appellate courts in accord and none in opposition, this issue is of little importance and certainly does not warrant the issuance of a writ of certiorari.

Initially, the Fourth Circuit held that unless the settlement agreement specifically apportioned liability between the Claimant and his family members, then the employer would be entitled to a total offset. Both the Fourth Circuit and the Petitioner were relying upon the decision of the Board in *Force v. Kaiser Aluminum & Chemical Corp.*, 23 BRBS 1 (1989), which had held same. However, the Ninth Circuit reversed the Board's decision prompting the Director to file a Petition for Rehearing which was granted and the Fourth Circuit reversed this portion of its decision.

The Fourth Circuit properly concluded that "employers are not automatically entitled to a full offset whenever the settlement agreement at issue fails to address the issuance of apportionment." *Id.* Rather, the Administrative Law Judge should hear evidence on the issue of which portion of the settlement was entitled for loss of consortium and which portion was intended to give to the

Claimant. *Id.* There is evidence in this case to indicate that the money was for loss of consortium since the Release was signed by both Mr. and Mrs. Sellman. The burden of proof is on the employer as explained at great length by the Ninth Circuit in *Force*. This issue is not of sufficient importance to warrant an issuance of certiorari.

III.

THE FOURTH CIRCUIT PROPERLY FOLLOWED ITS OWN LOCAL RULES GOVERNING PETITIONS FOR REHEARING.

The Petitioner's arguments relating to due process are baseless. Petitioner's argument that the Director's Petition for Rehearing was untimely and in violation of the Fourth Circuit's local rules is simply incorrect. The government requested an extension of time to file same which was granted by the Fourth Circuit on February 3, 1992, twelve days after its decision. Local Rule 40.3 allows the government additional time to conduct a through analysis of the case when such a request is made within 14 days of the court's decision.

The Petitioner's attempt to distinguish between the Solicitor General's office and the Department of Labor makes no sense. If the Fourth Circuit only intended to allow the Solicitor General to ask for an extension of time to file a Petition for Rehearing and the Solicitor General only handles cases at the Supreme Court level, then such a narrow exception would obviously never be utilized. The real purpose of the section was to allow the government time to decide whether to file a Petition for Certiorari, a Petition for Rehearing, or to take no action at all. Certainly, the Fourth Circuit is the final arbiter of its own rules.

I.T.O.'s argument that it was denied due process because of

the Fourth Circuit's failure to allow it to respond to the Petition is without merit. As the Petitioner concedes, the Court has discretion to deny such a request. I.T.O. had already briefed the issue and the Court certainly knew its position on the issue. The sole purpose of the Petition was to bring to the Court's attention the decision of the Ninth Circuit in *Force* since the Fourth Circuit had relied upon the Board's decision below.

CONCLUSION

For the reasons stated above, certiorari should be denied in this case.

Respectfully submitted,

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